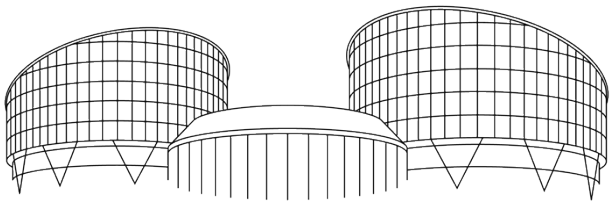

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF GRZELAK v. POLAND

(Application no. 7710/02)

JUDGMENT

STRASBOURG

15 June 2010

FINAL

22/11/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Grzelak v. Poland**,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 25 May 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7710/02) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Polish nationals, Ms Urszula Grzelak, Mr Czesław Grzelak and Mateusz Grzelak ("the applicants"), on 25 January 2002.

2. The applicants were represented by Ms M. Wentlandt-Walkiewicz, a lawyer practising in Łódź, and subsequently by Ms M. Hartung and Mr J. Ciećwierz, lawyers practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicants complained, in particular, about the absence of a mark for "religion/ethics" on the school reports of Mateusz Grzelak.

4. On 15 May 2007 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. Written submissions were received from the Helsinki Foundation for Human Rights in Warsaw, which had been granted leave by the President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first two applicants, Urszula and Czesław Grzelak, were born in 1969 and 1965 respectively. They are married and live in Sobótka. They are the parents of Mateusz Grzelak ("the third applicant"), who was born in 1991. The first two applicants are declared agnostics.

7. The third applicant began his schooling in primary school no. 3 in Ostrów Wielkopolski in 1998 (at the age of seven). In conformity with the wishes of his parents he did not attend religious instruction. It appears that he was the only pupil in his class who opted out of that subject. Religious instruction was scheduled in the middle of the school day, between various compulsory courses. The school, despite the wish expressed by the first two applicants, did not offer their son an alternative class in ethics. It appears that when other pupils in his class were following religious instruction the applicants' son was either left without any supervision in the corridor or spent his time in the school library or in the school club.

8. The Government, for their part, maintained that appropriate supervision had been provided for Mateusz Grzelak while religious instruction classes were in progress. The school had a general obligation of care and supervision towards all pupils who were on its premises at any time.

9. According to the first two applicants, their son was subjected to discrimination and physical and psychological harassment by other pupils on account of the fact that he did not follow religious instruction. For that reason, in the course of the third year of primary school the applicants moved their son to primary school no. 9 and subsequently to primary school no. 11 in the same town.

10. On 11 April 2001, when their son was in the third year of primary school, the applicants sent a letter to the headmistress of primary school no. 9 in Ostrów Wielkopolski. They drew her attention to the fact that their son had been ridiculed and harassed by other pupils in the class. They stated that their son was being discriminated against by the majority of his classmates because he did not attend religious education classes. The applicants requested the assistance of the school in resolving the issue.

11. According to the Government, the applicants did not wait for a reply to their letter of 11 April 2001 and moved their son to primary school no. 11. In a letter of 26 June 2001 the headmistress of primary school no. 9 explained that Mateusz Grzelak had attended that school from 23 October 2000 to 19 April 2001. She noted that he had frequently provoked his colleagues by mocking religious symbols and children who attended religious instruction. The class tutor had informed Mr and Mrs Grzelak

about their son's behaviour but they had not responded. The headmistress explained further that the school did not ask for a written declaration as to children's attendance at religious instruction. It sufficed for a parent who did not wish for his or her child to attend religious instruction to report that fact to the class tutor.

12. The Government further maintained that Mr and Mrs Grzelak had requested primary school no. 11 to provide their son with a course in ethics. According to the Government, the headmistress of that school had contacted the Poznań Education Authority (*kuratorium oświaty*) to establish whether it was possible to provide such a course for an inter-school group. Since that was not possible owing to the lack of sufficient numbers of interested pupils and parents, the school proposed to the third applicant that he participate in alternative classes in the school club or school library. It appears that the applicants did not report any problems to the school concerning their son's education.

13. On 1 May 2001 the applicants sent a letter to the Minister of Education, stating that since the beginning of their son's education they had encountered religious intolerance and that the school authorities had failed to react. They put a number of questions to the Minister concerning the Ordinance on the organisation of religious instruction in State schools (see relevant domestic law and practice below). In particular, the applicants raised the following matters in their letter:

> 1. Why did some schools require declarations from parents as to whether their children would be following religious instruction?
>
> 2. Was the school obliged to organise a class in ethics just for one pupil?
>
> 3. Why should children like the applicants' son pass their time unproductively in the school club while other children were attending religious instruction or when the schools were closed for Lent retreat?
>
> 4. Did the fact that a child had a straight line instead of a mark for "religion/ethics" on a school report indicate that the Ordinance of 14 April 1992 of the Minister of Education on the organisation of religious instruction in State schools ("the Ordinance") infringed the Education Act and human rights instruments?
>
> 5. What could parents do when their child was discriminated against and harassed for not having attended religious instruction?

14. On 29 May 2001 the Ministry of Education replied to the applicants. In respect of the issues raised by the applicants it informed them as follows:

Re question 1: Religious instruction and courses in ethics were organised at the parents' request, and where a declaration to that effect was asked for, it was for organisational reasons only.

Re question 2: If only one pupil was interested in following a course in ethics, then the school authorities should enquire whether it would be possible to follow that course in an inter-school group. If in a given

municipality there was no such group, then the school had to arrange for supervision of the pupil during the religious education class.

Re question 3: In the case referred to above the school should organise other activities for pupils not following religious instruction or supervise them adequately by allowing them to do their homework or to use the library, etc.

Re question 4: Paragraph 9 of the Ordinance regulated the manner in which marks for "religion/ethics" were entered in school reports. That provision had been interpreted by the Constitutional Court in its judgment of 20 April 1993 (see relevant domestic law and practice below). The Constitutional Court had noted that the inclusion of marks for "religion/ethics" in a school report was a consequence of providing courses in those subjects in State schools. Furthermore, the Constitutional Court observed that this rule did not breach the right to freedom of conscience and religion.

Re question 5: Discrimination against pupils on the ground of their not having attended religious instruction amounted to a breach of the Ordinance and should be reported to the relevant education authorities.

15. The applicants also applied to the Ombudsman on 14 June 2001, alleging that in their son's case Articles 53 § 7 and 31 § 2 of the Constitution, Articles 9 and 14 of the Convention and various other provisions had been breached. The Ombudsman replied that he could not challenge the Ordinance again following the judgment of the Constitutional Court of 20 April 1993. The problems raised in their letter had more to do with the inappropriate behaviour of some teachers and pupils than the law itself.

16. On 17 October 2001 the applicants sent a letter to the President of the Republic. They requested him to amend the Ordinance with a view to providing guarantees for non-religious children. On 6 November 2001 the President's Office requested the Ministry of Education to reply to the applicants' letter.

17. On 10 December 2001 the Ministry of Education confirmed its position as set out in the letter of 29 May 2001. In addition to the issues already addressed, the Ministry replied to the applicants' complaint concerning the obligation to make a declaration as to whether the child would follow religious instruction. The Ministry informed the applicants that the school authorities could not require parents to make a "negative declaration", that is, a declaration that their child would not follow religious instruction. Such a practice would contravene the provisions of the Ordinance and should be reported to the education authorities. The Ministry further informed the applicants that the parents' declaration could not be understood as a declaration concerning their beliefs.

18. The applicants submitted that they had made repeated requests to the school authorities, asking for their son to be allowed to follow a course in ethics instead of religious instruction. However, none of the primary schools attended by their son had provided a course in ethics. The refusals had been based on the lack of suitable teachers, financial reasons and insufficient numbers of pupils interested in following a course in ethics.

19. In September 2004 the third applicant began his secondary education.

20. On 16 July 2009 Mr and Mrs Grzelak complained to the Poznań Education Authority (*kuratorium oświaty*) that their son had not been offered a course in ethics at Ostrów Wielkopolski secondary school no. 2. Their petition (*skarga*) was referred to the Ostrów District (*powiat*) which, as the authority responsible for the school, was competent in the matter. On 27 August 2009 the Council of the Ostrów District dismissed the petition as unfounded. It found that Mateusz Grzelak was the only student in all the schools run by the Ostrów District whose parents wished him to follow a class in ethics. Accordingly, the conditions for the provision of such a class, as set out in the Ordinance, had not been met.

School reports of the third applicant

21. The school report of the third applicant for the first three years of primary school contained three subjects: behaviour (*zachowanie*), religion/ethics and general education. In the place reserved for a mark for "religion/ethics" the school report had a straight line.

22. The school report for the fourth year contained a list of courses that the third applicant had followed, including "religion/ethics". Once again, there was a straight line against the subject "religion/ethics".

23. In the school report for the fifth year in respect of the subject "religion/ethics" there was a straight line and the word ethics was crossed out. A similar situation applied to the primary school leaving certificate which the third applicant obtained in June 2004.

24. In September 2004 the third applicant began his secondary education in lower secondary school (*gimnazjum*) no. 4 in Ostrów Wielkopolski. His school reports for the first two years at that school and the leaving certificate of June 2007 had a straight line in the space for "religion/ethics".

25. In September 2007 the third applicant began studying at Ostrów Wielkopolski secondary school no. 2 (*liceum*). On 4 September 2007 his parents requested the school to allow him to take a class in ethics, but it appears that no such class was organised. The school reports for the first and second year in that school had a straight line in the space for the subject "religion/ethics". The third applicant failed German language in the second year of the *liceum* and from the school year 2009/2010 he moved to the Ostrów Wielkopolski vocational secondary school.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Relevant constitutional provisions prior to the adoption of the 1997 Constitution

26. Article 82 of the Constitution of 1952 retained in force by the Constitutional Act of 17 October 1992 provided as follows:

> "1. The Republic of Poland shall ensure to its citizens freedom of conscience and religion. The church and other religious organisations may freely exercise their religious functions. Citizens shall not be compelled not to participate in religious practices or rites. No one shall be compelled to participate in religious practices or rites.
>
> 2. The church shall be separated from the State. The principles of relations between the State and church and legal and financial position of religious organisations shall be determined by statutes."

2. The Law of 17 May 1989 on guarantees for freedom of conscience and religion ("the Freedom of Conscience and Religion Act")

27. Section 1 of the Freedom of Conscience and Religion Act provides in so far as relevant:

> "1. Poland ... shall secure to its citizens freedom of conscience and religion.
>
> 2. Freedom of conscience and religion shall include freedom to choose one's religion or beliefs and freedom to manifest one's religion or beliefs, either alone or in community with others, in private and in public. ..."

Section 2 of the Act states, in so far as relevant:

> "In the exercise of their freedom of conscience and religion, citizens may in particular: ...
>
> (2)(a) belong, or not belong, to churches or other religious communities;
>
> (3) express their religious opinions;
>
> (4) raise their children in conformity with their religious convictions;
>
> (5) remain silent as to their religion or convictions ... ."

3. Religious instruction in State schools

(a) The situation prior to the 1991 Education Act

28. The majority of schoolchildren attend State schools. On 3 and 24 August 1990 the Minister of Education issued two circulars (*instrukcje*),

introducing instruction in Roman Catholicism and other religions into State schools on a voluntary basis. According to these circulars, parents of primary school pupils and parents and/or pupils in secondary schools were to make a declaration as to whether they wished to attend religious instruction.

29. The Ombudsman challenged the conformity of certain provisions of these circulars with the constitutional provisions in force at the time and the statutory law. She stressed that the problem of religious instruction should be regulated by statute and not by subordinate legislation. The Ombudsman submitted that declarations by parents or students concerning attendance of religious instruction classes constituted a form of public manifestation of their religious convictions. Such a practice ran contrary, in the Ombudsman's view, to the Freedom of Conscience and Religion Act, which stipulated that citizens had the right not to disclose their religion or beliefs. In its judgment of 30 January 1991 (case no. K 11/90), the Constitutional Court held that the provisions challenged by the Ombudsman were in conformity with the Constitution and the statutes.

(b) The 1991 Education Act

30. On 7 September 1991 Parliament enacted the Law on education ("the 1991 Education Act"). Section 12 of the Act expressly provided that religious instruction could be provided in State schools at the request of parents or of pupils who had reached the age of majority.

(c) The Ordinance of the Minister of Education of 14 April 1992

31. On 14 April 1992 the Minister of Education issued the Ordinance on the organisation of religious instruction in State schools (*Rozporządzenie w sprawie warunków i sposobu organizowania nauki religii w szkołach publicznych* – "the Ordinance"). The Ordinance replaced the two ministerial circulars issued in 1990.

32. The Ordinance provided that religious education and ethics were optional subjects. Parents of pupils[1] who wished their children to follow either of those subjects were to make a declaration to the school authorities to that effect. If the number of pupils in a given class interested in following any of these subjects was less than seven, then the school was to organise the relevant course for pupils of different classes from the same school (an inter-class group). If the inter-class group was smaller than seven pupils, the authorities were to organise the relevant course in cooperation with other schools in the municipality (inter-school group), provided that there was a minimum of three pupils interested in following it.

1. Pupils who had reached the age of majority could decide for themselves.

33. Paragraph 9 of the Ordinance provided, in so far as relevant:

> "1. The mark for religion or ethics is placed on the school certificate directly after the mark for behaviour. In order to eliminate any possible manifestations of intolerance the school certificate shall not contain any data that would indicate which religion (or ethics) course was followed by a pupil."
>
> 2. The mark for religion (ethics) has no influence on whether a pupil moves up to the next grade."

(d) The Ombudsman's challenge against the Ordinance

34. In August 1992 the Ombudsman challenged the conformity of numerous provisions of the Ordinance with the constitutional provisions in force at the material time and the Freedom of Conscience and Religion Act.

35. The Ombudsman objected to, among other provisions, paragraph 9 of the Ordinance, arguing that the insertion of a mark for "religion/ethics" on school reports was unacceptable since reports were official documents issued by State schools and the teaching of religion was the prerogative of the Church. In addition, this provision created the risk of intolerance. He further alleged that the provision in question was in breach of the constitutional principle of separation of Church and State and the principle of the State's neutrality, as provided for in the Freedom of Conscience and Religion Act.

36. The Ombudsman also contested the obligation imposed on parents (pupils) to make a "negative declaration" to the effect that they did not wish their children to follow religious instruction in a State school (paragraph 3(3) of the Ordinance). He argued that no public authority in the State, which had a duty to remain neutral in the sphere of religious beliefs and philosophical convictions, could require citizens to make such declarations.

37. The Ombudsman further alleged that paragraph 12 of the Ordinance allowed for excessive display of crucifixes in other places in schools than classrooms designated for religious instruction.

(e) The judgment of the Constitutional Court of 20 April 1993 (case no. U 12/92)

38. The Constitutional Court upheld for the most part the constitutionality and legality of the Ordinance. It noted that the inclusion of religious instruction in the State school curriculum did not infringe the constitutional principle of separation of Church and State and the principle of the State's secular character and neutrality. According to the Constitutional Court, the principles in question required that both State and Church remain autonomous in their respective spheres of activity. However, their autonomy should not lead to isolation or even competition between them, but on the contrary should allow them to cooperate in those areas, such as the ethical education of children, which served the common good

and the development of the individual. The Constitutional Court further observed that the secular character of the State and its neutrality could not amount to a prohibition on providing religious instruction in State schools. Moreover, according to the Education Act, the provision of religious instruction was always subject to parents' wishes. Referring, among other provisions, to Article 2 of Protocol No. 1 to the Convention, the Constitutional Court noted that the State could not escape its obligation to provide religious education which conformed to parents' wishes.

39. The Constitutional Court held that the Ordinance should be construed as granting each pupil the right to follow classes in both religion and ethics as opposed to the alternative of choosing only one of them. Adopting such an interpretation of the Ordinance would deal with the Ombudsman's concerns about the division of pupils into believers and non-believers.

40. As to the insertion of marks for religious instruction in school reports, the Constitutional Court found it to be in conformity with the Education Act. Furthermore, it observed that this was a consequence of the provision of religious instruction, on a voluntary basis, by State schools. In accordance with the Education Act, school reports should contain marks for all subjects (compulsory and optional) taken by a pupil in a given school year. This rule applied equally to marks for religion if that subject was taught in a State school.

41. Replying to the Ombudsman's concerns, the Constitutional Court held as follows:

> "In order to dispel possible doubts in this respect, the Constitutional Court indicated in the seventh point of the operative part of its judgment that a mark on a school report may refer not just to religious instruction alone or to ethics alone; in cases where a pupil follows both those courses he or she may be given a joint mark [for the two subjects]. The impugned provision therefore contains a dual safeguard. First, a mark shown on the school report does not indicate any specific religion, and secondly it is not known whether such a mark relates to religious instruction, ethics or both subjects jointly."

42. As to the obligation to make a "negative declaration", the Constitutional Court struck down paragraph 3(3) of the Ordinance on the grounds of its incompatibility with the Education Act. Paragraph 3(3) of the Ordinance as amended made no reference to a "negative declaration". It entered into force on 9 September 1993.

43. As regards the display of the crucifix in State schools, the Constitutional Court found that the paragraph 12 of the Ordinance provided for such a possibility but did not mandate the presence of the crucifix in schools. Accordingly, this provision was compatible with Article 82 of the Constitution.

4. The Constitution of 2 April 1997 and the relevant case law of the Constitutional Court

(a) The relevant constitutional provisions

44. Article 25 § 2 of the 1997 Constitution provides:

> "Public authorities in the Republic of Poland shall be impartial in matters of religious and philosophical convictions, and shall ensure freedom to express them in public life."

Article 48 § 1 of the Constitution provides:

> "Parents shall have the right to raise their children in accordance with their own convictions. The child's upbringing shall respect his degree of maturity as well as his freedom of conscience and belief and also his convictions."

Article 53 of the Constitution provides as follows:

> "1. Freedom of conscience and religion shall be secured to everyone.
>
> 2. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites or teaching. Freedom of religion shall also include the availability of sanctuaries and other places of worship designed to meet the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.
>
> 3. Parents shall have the right to provide their children with a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48 § 1 shall apply as appropriate.
>
> 4. The religion of a church or other legally recognised religious organisation may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby.
>
> 5. The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others.
>
> 6. No one shall be compelled to participate or not participate in religious practices.
>
> 7. No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or beliefs.

(b) The judgment of the Constitutional Court of 5 May 1998 (case no. K 35/97)

45. The Constitutional Court was asked to review the constitutionality of amendments to the Freedom of Conscience and Religion Act. The amendments repealed the provisions of a number of laws regulating relations between certain Churches and the State, which granted the former the right to have marks for their religious instruction entered in school

reports. The Constitutional Court upheld the constitutionality of the impugned provisions and held that the Churches concerned were not, in fact, divested of the above-mentioned right. Following the entry into force of the amendments, the Churches simply had to fulfil the conditions set out in the Ordinance of the Minister of Education on the organisation of religious instruction in State schools, which were equally applicable to all Churches and religious organisations.

(c) The judgment of the Constitutional Court of 2 December 2009 (case no. U 10/07)

46. The Constitutional Court was asked to examine the constitutionality of the amended Ordinance of the Minister of Education of 13 July 2007 on the marking of pupils' work (*Rozporządzenie Ministra Edukacji Narodowej z dnia 13 lipca 2007 r. zmieniające rozporządzenie w sprawie warunków i sposobu oceniania, klasyfikowania i promowania uczniów i słuchaczy oraz przeprowadzania sprawdzianów i egzaminów w szkołach publicznych*). The amended Ordinance introduced for the first time the rule that marks obtained for religious instruction or ethics, as well as other optional courses, would be counted towards the "average mark" obtained by a pupil in a given school year and at the end of a given level of schooling. The amended Ordinance entered into force on 1 September 2007.

47. The Constitutional Court in its judgment of 2 December 2009 held that the impugned amendments to the Ordinance on the marking of pupils' work were compatible with Articles 25, 32, 48 § 1 and 53 § 3 of the Constitution. The Constitutional Court found, *inter alia*, as follows:

> "The counting of the mark for religion towards the average annual mark and the final mark is – as the [Constitutional] Court emphasises again – a consequence of the introduction of religious education into the school curriculum and of the recording of marks for religion on school reports in State schools. It is a consequence of the constitutional guarantees of religious freedom rather than of support for theistic beliefs. On the basis of the existing regulations, pupils (or their parents or legal guardians) have the possibility to choose between classes in a specific religion or classes in ethics as an alternative subject for those who do not hold religious beliefs. The Constitution does not provide specific guarantees for instruction in the beliefs enumerated by the claimant (atheistic, pantheistic or deistic). It would be difficult even from an organisational viewpoint to offer such a range of subjects to choose from. The knowledge necessary at this level of teaching can be gained by interested [pupils], for instance, in the framework of the subject 'ethics' or other subjects coming into the category of 'additional educational courses' which are mentioned in the impugned ordinance."

48. In the reasoning, the Constitutional Court relied on and confirmed the findings made in its judgment of 20 April 1993. It held, *inter alia*, as follows:

> "The Constitutional Court points out that the issue of conformity of the inclusion of marks for religion in official school reports with section 10(1) of the Freedom of Conscience and Religion Act, which stipulates that 'the Republic of Poland is a

secular State, neutral in the sphere of religion and beliefs', was already reviewed by the Constitutional Court in its judgment of 20 April 1993, case no U. 12/92. The subject of the review (also under Article 82 § 2 of the then Constitution) was paragraph 9 of the Ordinance of 14 April 1992. ... Ruling in the above case, *inter alia*, that paragraph 9 of the Ordinance of 14 April 1992 was compatible with section 10(1) (and with Article 82 of the then Constitution), the Court held that:

'The recording of marks for religion in school reports is a consequence of the organisation of religious instruction by State schools. ... A school report covers all school courses – compulsory and optional – and thus there are no grounds for excluding religious instruction. Clearly, the Minister of Education could decide otherwise and do away with the obligation to include marks on a school report. ...'

Endorsing the above findings, the Constitutional Court wishes to underline in connection with the case in issue that the counting of marks for religion towards the average annual mark and the final average mark is in turn a consequence of the recording of marks for religion on school reports in State schools. ....”

The Constitutional Court further noted:

“The Constitutional Court is aware of the fact that in specific cases, given the dominant position of the Roman Catholic faith in the religious make-up of Polish society, the choice of an additional subject (religion or ethics) by parents or pupils may not be entirely free, but may be taken under pressure from “local” public opinion. The free choice of the additional subject depends to a large extent on the respect for the principles of pluralism and tolerance for different convictions and beliefs in local communities. In specific cases in which external pressure – impinging on the free choice – was exerted it would have been the result of a low level of democratic culture. This important issue, while it is noted by the Constitutional Court, lies outside its jurisdiction. ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 9 OF THE CONVENTION

49. The applicants alleged that the school authorities had failed to organise a class in ethics for the third applicant and complained about the absence of a mark in his school reports in the space reserved for “religion/ethics”. They claimed that the third applicant had been subjected to discrimination and harassment for not having followed religious education classes. The applicants invoked Articles 9 and 14 of the Convention. The Court raised of its own motion a complaint under Article 8 of the Convention, namely whether the facts of the case disclose a breach of the State's positive obligation to ensure effective respect for the applicants' private life within the meaning of that provision.

50. The Court considers that it is appropriate to examine these complaints under Article 14 taken in conjunction with Article 9 of the Convention as regards the absence of a mark for the subject "religion/ethics". Article 9 of the Convention provides as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 14 reads:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

1. Compatibility ratione personae

51. The Government pleaded that the first two applicants did not have victim status in respect of the complaints under Articles 9 and 14 of the Convention. In particular, they submitted that Mr and Mrs Grzelak could not be considered victims of any violations of Articles 9 and 14 caused by the actions or omissions of the public authorities with regard to the provision of religious instruction (ethics) or with regard to the form of school reports, as those issues concerned exclusively the rights of Mateusz Grzelak, the third applicant. The applicants did not comment.

52. The Court recalls that the complaint under Article 14 taken in conjunction with Article 9 concerns the absence of a mark for the subject "religion/ethics" in the third applicant's school reports. Having regard to the scope of the complaint under Article 14 taken in conjunction with Article 9, it accepts the Government's argument and notes that the issues arising under this provision of the Convention concern only the third applicant, Mateusz Grzelak (see, *mutatis mutandis*, *Valsamis v. Greece*, 18 December 1996, § 34, *Reports of Judgments and Decisions* 1996-VI). The Article 14 complaint taken in conjunction with Article 9 is therefore incompatible *ratione personae* with respect to the first and second applicants.

2. Exhaustion of domestic remedies

(a) The Government

53. The Government claimed that the third applicant had not exhausted domestic remedies with regard to his allegations of discriminatory treatment because no class in ethics had been provided as an alternative to religious instruction and because of the form of the school reports. They submitted that the Ordinance regulated in a comprehensive manner the duties of school authorities regarding the organisation of classes in religion or ethics. It imposed no obligation on schools to provide a class in ethics, as that depended on parents or pupils requesting it and on there being sufficient numbers of interested pupils. If Mr and Mrs Grzelak had considered that their son was being discriminated against by the school authorities on account of the absence of a course in ethics, they should have challenged the provisions of the Ordinance which did not provide for compulsory teaching of ethics instead of religious instruction. In their view, the applicant should have lodged a constitutional complaint against the manner of organising classes in ethics provided for in paragraphs 1 to 3 of the Ordinance.

54. The Government submitted that the Constitutional Court, in its judgment of 20 April 1993, had reviewed the constitutionality of the Ordinance in the light of the then applicable constitutional provisions. However, following the entry into force of the new Constitution in 1997 the applicants could have lodged a constitutional complaint relying on its provisions, in particular Article 53 § 4.

55. The Constitutional Court held in its judgment of 20 April 1993 that the Ordinance should be construed so as to allow every pupil to follow classes in both religious education and ethics. Thus, the Government maintained that the Constitutional Court had not reviewed the optional character of courses in ethics as an alternative to religious instruction in the light of the constitutional principles of equality (Article 32) and freedom of thought, conscience and religion (Article 53). Similar considerations applied should the applicants wish to challenge the very fact of giving a mark for "religion/ethics" or the lack of such a mark on their son's school report. In that case, they should have challenged paragraph 9(1) of the Ordinance.

(b) The third applicant

56. The third applicant argued that he had exhausted all domestic remedies. Regarding the possibility of a constitutional complaint, he submitted that it had not been available in his case. The Constitutional Court Act stipulated that a constitutional complaint could be lodged after legal remedies had been exhausted, in so far as such remedies were available, and within three months following the service of a final decision. The third applicant submitted that in his case no final decision had been given on the

basis of the unconstitutional Ordinance and that he could not therefore have availed himself of that remedy. Furthermore, he had put the matter to the Ombudsman in June 2001, who had informed him that he was bound by the Constitutional Court's judgment of 20 April 1993 and could not challenge the same provisions of the Ordinance again.

(c) The Court

57. The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

58. Nevertheless, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 142, ECHR 2006-...).

59. The Court notes that before lodging a constitutional complaint a claimant is obliged to obtain a final decision from a court or an administrative authority. More importantly, the Court points out that a constitutional complaint can be recognised as an effective remedy only where the individual decision which allegedly violated the Convention was adopted in direct application of an unconstitutional provision of national legislation (see *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003, and *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005). However, in the present case the applicants could not obtain any judicial or administrative decision in respect of their request that their son be taught a course in ethics instead of religious instruction and the Government did not claim that they could have obtained such decision. The Court observes in this connection that no such course was provided as the number of pupils interested was below the minimum number required by the Ordinance. Consequently, Mateusz Grzelak did not follow a course in ethics and had a straight line on his school reports in the space reserved for “religion/ethics”.

60. Moreover, the Court notes that the Constitutional Court, in its judgment of 2 December 2009 (case no. U 10/07 – see relevant domestic law and practice above) reviewing the compatibility with the 1997 Constitution of the amended Ordinance of the Minister of Education on the marking of pupils, upheld the findings made in its earlier judgment of 20 April 1993, in particular with regard to the constitutionality of providing

religious instruction (ethics) and the resulting insertion of marks for those subjects. It is true that the Constitutional Court on both occasions did not address the specific issue of the non-insertion of a mark or the insertion of a straight line. However, the Court notes that in its judgment of 20 April 1993 the Constitutional Court did not accept the argument that the recording of marks for religion in school reports amounted to a breach of the principle of separation of Church and State and the principle of the State's neutrality. The Constitutional Court further considered that the recording of such marks did not give rise to an issue as regards the right not to reveal one's religion or convictions as provided in section 2 (5) of the Freedom of Conscience and Religion Act. In these circumstances, the Court finds that any attempt to mount a successful challenge to the issue of the non-insertion of a mark for "religion/ethics" would be futile. For the above reasons, the Court considers that a constitutional complaint cannot be regarded with a sufficient degree of certainty as an effective remedy in the present case.

61. It follows that the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

3. Conclusion as to admissibility

62. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible with respect to the third applicant.

B. Merits

1. The third applicant's submissions

63. The third applicant alleged a breach of Article 9 of the Convention since his school reports did not feature a mark for "religion/ethics". In addition, despite numerous requests submitted by his parents to the various primary and secondary schools attended by the third applicant, he had been unable to follow a class in ethics. Moreover, Mateusz Grzelak had been discriminated against on account of his and his parents' convictions.

64. The third applicant submitted that the entire education system in Poland was geared towards Catholicism and that those who did not share that faith were discriminated against. He argued that in practice classes in ethics were not provided in State schools. For that reason many non-Catholic parents sent their children to religious instruction classes in order to avoid the problems which the third applicant had been confronted with.

65. The third applicant claimed that in the conditions prevailing in Poland a person could not freely decide on his own or with the help of his parents about such a fundamental issue as belief in God and choosing one's

religion. In his view, the possibility to make independent decisions in that sphere was one of the most important human rights. He claimed that he had been deprived of the right to freedom of thought, conscience and religion on account of the defective Ordinance and its unreasonable application. He referred to the specific circumstances of his case, such as the obligation to submit a declaration stating that he would not follow religious instruction, the impossibility of his following a class in ethics owing to organisational difficulties, the presence of a straight line instead of a mark on his school reports, the fact that teachers tolerated his humiliation and the failure of the State authorities to react to these problems. The third applicant stressed that the issues concerned might not appear particularly serious when viewed in isolation, but that their cumulative effect meant that the he had been deprived of his right to freedom of thought, conscience and religion.

66. The third applicant maintained that that freedom was very important to him and that he had fought hard for it. The price he paid was humiliation, social ostracism, being forced to change schools and being subjected to physical violence. These examples of suffering showed that the third applicant had been personally stigmatised. He concluded that the facts of their case amounted to a breach of Articles 9 and 14 of the Convention.

2. The Government's submissions

67. In Poland there was no form of compulsory religious or ethical education in State schools, which made the present case entirely different from *Folgerø and Others v. Norway* ([GC], no. 15472/02, ECHR 2007-VIII). The Government stressed firstly that in accordance with paragraph 1(1) of the Ordinance, religion or ethics classes could be provided only at the request of parents or of pupils who had reached the age of majority. Secondly, the teaching of religion or ethics could be organised only if sufficient numbers of parents (pupils) expressed such a wish (see relevant domestic law and practice above). The Government submitted that in cases where it was particularly justified, either of these optional subjects could be organised in a different manner from that specified in the Ordinance, depending on the resources available to the local authority which ran the school. There was no obligation to organise such classes where there were insufficient numbers of interested pupils in a municipality, if the latter did not have adequate resources to cover the costs involved. Having regard to the above, the Government maintained that the school authorities or the authority which administered the schools attended by Mateusz Grzelak had not been obliged to organise a course in ethics for him, given that there were not enough interested pupils in the same school or municipality.

68. The Government submitted that the circumstances of the case gave no indication of any interference with the third applicant's rights under Article 9 of the Convention on account of the fact that no ethics class had

been organised for him in State schools. There were no indications that the third applicant had been in any way indoctrinated or subjected to any form of pressure as to his personal beliefs. Article 9 of the Convention did not deal with States' obligations regarding the content of school curricula.

69. As to the absence of a mark for "religion/ethics", the Government pointed out that the Convention institutions had already dealt with this issue on two occasions. In *C.J., J.J. and E.J. v. Poland* (no. 23380/94, 16 January 1996), the European Commission of Human Rights had declared the application manifestly ill-founded. In the case of *Saniewski v. Poland* ((dec.), no. 40319/98, 26 June 2001), the Court had found that the applicant had not substantiated his claim that the absence of a mark for "religion/ethics" on his school report might prejudice his future educational or employment prospects. Furthermore, no conclusions could be drawn on the basis of the school report as to whether the applicant had chosen not to attend the courses for which no mark was given or whether those courses had simply not been organised in his school in that particular year.

70. The Government argued that the third applicant's situation in the present case was very similar to the *Saniewski* case. The school report was an official document which contained objective information as to the attendance and assessment of a pupil's achievements in courses which had been organised and had been attended by him or her. It might happen that a pupil did not attend some courses for various reasons, for instance because he or she was exempted from physical education on health grounds. Where pupils did not attend a given course, such as a course in religion or ethics or physical education, this was normally reflected in the standard school reports, as it would be unreasonable to expect that those pupils should receive their reports in a different form.

71. The Government stressed that the lack of a mark for "religion/ethics" on the third applicant's school reports did not constitute interference with his rights under Article 9, as the reports did not disclose his philosophical or religious beliefs. The absence of a mark or the presence of a line on a school report could not be interpreted as anything more than official information as to whether or not a pupil had been following a religion/ethics class in a particular year. Hence, the third applicant's right to remain silent with regard to his philosophical or religious beliefs had been fully respected. Furthermore, the Government claimed that the applicant had not provided any evidence that the form of the school reports constituted interference with his Article 9 rights. He had not pointed to any inconvenience of a sufficient degree of seriousness to be considered as a breach of his rights under Article 9.

72. The Government further submitted that the mark for "religion/ethics" was not included in the calculation of the so-called "average mark" (*średnia*), with the result that pupils not following those courses were not discriminated against compared with those who followed

them. As to the 2007 amendments to the relevant Ordinance of the Minister of Education on the marking of pupils' work which changed the above rule, the Government maintained that counting the mark for religion/ethics towards the "average mark" was just a consequence of the choice made with respect to attendance at religion/ethics classes.

73. In addition, the mark for "religion/ethics" on the school diplomas awarded at the end of primary school or *gimnazjum* did not influence a pupil's prospects in respect of the level of his or her subsequent education, since access to both junior secondary schools and to secondary schools depended solely on the results of the examination taken at the end of the relevant education period. The Government stressed that under no circumstances would the absence of such a mark be problematic when it came to admission to university.

74. Furthermore, the Government claimed that it was difficult to deduce a positive obligation to conceal whether a pupil followed a religion/ethics class in a State school in terms of the protection of Article 9 rights. The provisions of the Ordinance contained sufficient positive measures to protect pupils and their parents against having to reveal their convictions and beliefs. Any "special" protective or positive measures in respect of pupils whose parents did not wish them to follow religion/ethics classes could turn against the children themselves; this would hardly be desirable. There was no objective justification for awarding different school diplomas for pupils given a mark for "religion/ethics" and those with no such mark.

75. The Government observed that the issue of whether or not pupils followed religion/ethics courses was a delicate one, since the parents' choice, taken in conformity with their own convictions, might cause their child to belong to a minority in a certain class or school. The authorities should do their utmost to minimise the risk of a child's stigmatisation because he or she did not follow a religion/ethics course. It was the school's duty to provide pupils who did not follow a class in religion or ethics with care and supervision whenever they were on the school premises. It was also the school's duty to react to all manifestations of intolerance towards such children. The Government claimed that those obligations had been complied with in the present case. They also noted that, owing to the nature of the issue, it was not only the school which had positive obligations with respect to freedom of thought, conscience and religion; it was first and foremost the parents' duty to ensure that their children understood the choice made by them as regards religion/ethics education at school. The Government observed that the press articles attached to the application lodged by Mr and Mrs Grzelak did not support the assertion that it was their intention to protect their personal beliefs from being disclosed.

76. The Government submitted that the Ordinance did not focus on any particular religion, although it was true that the vast majority of religion classes concerned the Catholic faith.

3. The third-party intervener's comments

77. According to the Helsinki Foundation for Human Rights, statistical data showed that there was a huge disparity between the availability of classes in religious education and classes in ethics. As indicated by the Ministry of Education, of 32,136 schools, 27,500 (85.57%) organised religious instruction classes (all religions), while ethics was taught only in 334 schools (1.03%). There were 21,370 teachers of religion and only 412 teachers of ethics[2].

78. The lack of clear provisions and guidelines concerning the teaching of ethics made the right to choose it as an alternative to religious instruction only a theoretical possibility. The minimum number of seven pupils per class for inter-class teaching, as provided for in the Ordinance, resulted in indirect discrimination of pupils belonging to minorities, whether religious or non-believing. At national level the relevant criteria were met only by the Catholic Church, and on the regional level by the Orthodox Church and the Lutheran Church. In 2003 the number of Catholics was estimated at 34,443,998 (90.1% of the whole population), the number of Orthodox Christians at 510,712 (1.34%) and the number of Protestants at 162,102 (0.42%).

79. The criterion of a minimum of seven children for a class or inter-class group, while it appeared practical, was set at a high level. It could be lower, as was the case regarding the teaching of national or ethnic minority languages[3]. Financial considerations could not provide a convincing explanation for the differences in the provision of teaching in minority languages and the teaching of ethics. Moreover, individual classes could be organised for gifted children, those who were ill or those who had difficulties with the curriculum, and the same opportunities should be available to pupils who wanted to follow ethics classes. The minimum number of three pupils for an inter-school group was more reasonable. However, such groups were not organised since the Ordinance did not provide any details regarding the procedure for organising them, by contrast to the rules concerning minority languages. Accordingly, the relevant provisions of the Ordinance were illusory and ineffective. In Warsaw such inter-school groups were never organised.

80. The third party observed that the Ordinance focused primarily on the rights of followers of the Catholic Church. That was evident, *inter alia*, from its structure, as the majority of provisions concerned the teaching of religion. In some cases the rules concerning the organisation of religious instruction, which were to be applied by analogy to the organisation of courses in ethics, did not have any equivalent in relation to the latter.

2. Data for the school year 2006/2007.

3. The Ordinance of the Minister of National Education and Sport of 3 December 2002 on the teaching of national or ethnic minority languages.

Furthermore, there were no curriculum guidelines (*podstawa programowa*) for courses in ethics in the first three years of primary school. The lack of courses in ethics created a certain pressure on pupils to attend religious instruction, even leaving aside the intentions of the school staff.

81. The third party maintained that the unavailability of courses in ethics in Polish schools meant that there was no option to attend such a course. As a result, interested pupils would have either no mark for "religion/ethics" on their school reports, or a straight line. This signified that a particular pupil had not followed the religious instruction which was organised in almost all schools. Not following that course did not in itself mean that the pupil was a non-believer; however the cultural context of a given country had to be taken into consideration in this respect. In a Catholic society such pupils were very likely to be perceived as non-believers. There was a risk of discrimination in that regard.

82. The third party argued that the right not to disclose one's religion or convictions was a fundamental right. However, where no mark or a straight line was given for "religion/ethics", the person's convictions were disclosed indirectly. The third party pointed out that the Constitutional Court, in its judgment of 20 April 1993, had held that the mark for "religion/ethics" made it impossible to determine which of the two subjects had been followed by a pupil. However, where courses in ethics were not provided in schools, there were many pupils who had a straight line or no mark for "religion/ethics". The risk of discrimination associated with revealing on a school report that a pupil attended religion or ethics classes had been acknowledged by the Minister of Education, as evidenced by the second sentence of paragraph 9(1) of the Ordinance. The third party maintained that a school report was a public document which should not contain information concerning a person's convictions, as this could adversely influence the rights of the individual in a predominantly Catholic society. In its opinion, supported by research carried out in 1996, discrimination on the basis of beliefs was not merely a fringe phenomenon in Polish schools.

83. The problems described by the third party would become even more acute starting in the 2007/2008 school year. The relevant Ordinance of the Minister of Education on the marking of pupils had been amended in such a way that the mark obtained for "religion/ethics" would have a real impact on whether or not a pupil moved up to the next class, because the mark would count towards the average overall grade achieved by the pupil in a given school year. In those circumstances, there was a risk that pupils would follow religious instruction against their will in order to have the mark counted as part of their average mark.

4. The Court's assessment

84. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 34, ECHR 2000-X).

85. Further, the Court reiterates that freedom of thought, conscience and religion, as enshrined in Article 9, is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A, and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I).

86. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom of thought, conscience and religion in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (see *Kokkinakis*, cited above, § 33). The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs**,** and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 107, ECHR 2005-XI).

87. The Court reiterates that freedom to manifest one's religious beliefs comprises also a negative aspect, namely the right of individuals not to be required to reveal their faith or religious beliefs and not to be compelled to assume a stance from which it may be inferred whether or not they have such beliefs (see, *Alexandridis v. Greece*, no. 19516/06, § 38, ECHR 2008-..., and, *mutatis mutandis*, *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, § 76 *in fine*, ECHR 2007-XI). The Court has accepted, as noted above, that Article 9 is also a precious asset for non-believers like the third applicant in the present case. It necessarily follows that there will be an interference with the negative aspect of this provision when the State brings

about a situation in which individuals are obliged – directly or indirectly – to reveal that they are non-believers. This is all the more important when such obligation occurs in the context of the provision of an important public service such as education.

88. Having regard to the foregoing, the Court finds that the absence of a mark for "religion/ethics" on the successive school reports of the third applicant falls within the ambit of the negative aspect of freedom of thought, conscience and religion protected by Article 9 of the Convention as it may be read as showing his lack of religious affiliation. It follows that Article 14 taken in conjunction with Article 9 is applicable in the instant case.

89. For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification – in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Van Raalte v. the Netherlands*, cited above, § 39; *Larkos v. Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I; and *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006-...).

90. The third applicant complained of the discriminatory nature of the non-provision of courses in ethics and the resultant absence of a mark for "religion/ethics" on his school reports. The Court considers it appropriate to limit its examination of the alleged difference in treatment between the third applicant, a non-believer who wished to follow ethics classes, and those pupils who followed religion classes to the latter aspect of the complaint, namely the absence of a mark.

91. The Court observes that in the present case the parents of the third applicant systematically requested the school authorities to organise a class in ethics for him, as provided for in the Ordinance. However, no such class was organised for the third applicant between the 1998/1999 school year and the 2008/2009 school year, that is to say, throughout his entire schooling at primary and secondary level up to the present day. It appears that the reason was the lack of sufficient numbers of pupils interested in following such a class, in accordance with the requirements set out in the Ordinance. As no ethics class was provided throughout the third applicant's schooling, his school reports and leaving certificates contained a straight line instead of a mark for "religion/ethics".

92. The Court takes the view that the provisions of the Ordinance which provide for a mark to be given for "religion/ethics" on school reports cannot, as such, be considered to infringe Article 14 taken in conjunction with Article 9 of the Convention as long as the mark constitutes neutral information on the fact that a pupil followed one of the optional courses

offered at a school. However, a regulation of this kind must also respect the right of pupils not to be compelled, even indirectly, to reveal their religious beliefs or lack thereof.

93. The Court reiterates that religious beliefs do not constitute information that can be used to distinguish an individual citizen in his relations with the State. Not only are they a matter of individual conscience, they may also, like other information, change over a person's lifetime (see, *mutatis mutandis*, *Sofianopoulos and Others v. Greece* (dec.), nos. 1977/02, 1988/02 and 1997/02, ECHR 2002-X; and *Sinan Işık v. Turkey*, no. 21924/05, § 42, 2 February 2010). Although the above cases concerned identity cards, documents of arguably greater significance in a person's life than school reports for primary and secondary education, the Court nonetheless finds that similar considerations apply to the present case.

94. When reviewing the issue of a mark for "religion/ethics" on school reports, the Constitutional Court in its judgment of 20 April 1993 dismissed the arguments concerning the risk of a division between believers and non-believers (see paragraphs 40-41 above). The Constitutional Court's judgment was based on the assumption that any interested pupil would be able to follow a class in either of the two subjects concerned. Consequently, there would always be a mark on the school report for "religion/ethics". The Constitutional Court further held that a pupil could even follow both subjects in the same year, in which case his or her mark for "religion/ethics" would be an average mark for the two subjects. Having regard to the above, the Constitutional Court held that an outside observer would not be in a position to determine whether a pupil had followed a class in religion or in ethics.

95. The Court notes that the above analysis of the Constitutional Court, while unquestionable in its substance, appears to overlook other situations which may arise in practice. In the present case the pupil had no mark for "religion/ethics" on his school reports because the schools could not organise ethics classes despite repeated requests from his parents. The Court considers that the absence of a mark for "religion/ethics" would be understood by any reasonable person as an indication that the third applicant did not follow religious education classes, which were widely available, and that he was thus likely to be regarded as a person without religious beliefs. The Government in their submissions indicated that the vast majority of religious education classes concerned Roman Catholicism. The fact of having no mark for "religion/ethics" inevitably has a specific connotation and distinguishes the persons concerned from those who have a mark for the subject (see, *Sinan Işık*, cited above, § 51). This finding takes on particular significance in respect of a country like Poland where the great majority of the population owe allegiance to one particular religion.

96. Further, the Court notes that from 1 September 2007 onwards the situation of pupils like the third applicant would become even more

problematic on account of the entry into force of the amended Ordinance of the Minister of Education of 13 July 2007 on the marking of pupils' work (see paragraph 46 above). The amended Ordinance introduced the rule that marks obtained for religious education class or ethics would be included in the calculation of the "average mark" obtained by a pupil in a given school year and at the end of a given level of schooling. In this respect the Court observes that the above rule may have a real adverse impact on the situation of pupils like the applicant who could not, despite their wishes, follow a course in ethics. Such pupils would either find it more difficult to increase their average mark as they could not follow the desired optional subject or might feel pressurised – against their conscience – to attend a religion class in order to improve their average. It is noteworthy in this respect that the Constitutional Court in its judgment of 2 December 2009 referred to the risk that the choice of religion as an optional subject could have been the result of pressure from local public opinion, but nevertheless did not address this issue as lying outside its jurisdiction (see paragraph 48 *in fine* above).

97. For those reasons the Court is not persuaded by the Government's submissions to the effect that the absence of a mark for "religion/ethics" is entirely neutral and simply reflects the fact of following or not following a class in religious education or in ethics. This argument is further undermined by the fact that on the third applicant's primary school leaving certificate there was a straight line and the word "ethics" was crossed out. The message conveyed by such a document is unambiguous and anything but neutral: the ethics class was not available as an optional subject to the third applicant and he chose not to attend religion class.

98. Nor is the Court convinced by the Government's arguments that there are close similarities between the *Saniewski* inadmissibility decision and the present case. It finds that the present case can be distinguished from *Saniewski* on at least three grounds. Firstly, differently from *Saniewski*, in the instant case the allegations concern all the consecutive school reports of the third applicant, including his leaving certificate for primary and lower secondary schools. Secondly, in the present case the Court has examined the issues raised in the light of Article 14 taken in conjunction with Article 9 (in its negative aspect). Thirdly, the relevant new factor for the Court is the amended Ordinance of 2007 referred to above.

99. Having regard to the foregoing, the Court finds that the absence of a mark for "religion/ethics" on the third applicant's school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation of the third applicant.

100. In these circumstances, the Court is not satisfied that the difference in treatment between non-believers who wished to follow ethics classes and pupils who followed religion classes was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. The Court considers that the

State's margin of appreciation was exceeded in this matter as the very essence of the third applicant's right not to manifest his religion or convictions under Article 9 of the Convention was infringed.

101. There has accordingly been a violation of Article 14 taken in conjunction with Article 9 of the Convention in respect of the third applicant.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 1 TO THE CONVENTION

102. The first two applicants complained that the school authorities had not organised a class in ethics for their son in conformity with their convictions. They relied on Article 2 of Protocol No. 1 to the Convention.

103. The Government claimed that the first two applicants had not complained of any breach of their rights under Article 2 of Protocol No. 1. The Court notes that the first two applicants expressly alleged a breach of that provision in their application, and for that reason dismisses the Government's objection.

104. The Court reiterates that the general principles concerning the interpretation of Article 2 of Protocol No. 1 were recapitulated in the case of *Folgerø and Others* (cited above, § 84). In that case the Court reviewed under Article 2 of Protocol No. 1 the arrangements for a compulsory subject in Christianity, Religion and Philosophy taught during the ten years of compulsory schooling in Norway. The model existing in Poland is different in a number of respects. Religious education and ethics are organised on a parallel basis, for each religion according to its own system of principles and beliefs and, at the same time, it is provided that teaching of ethics is offered to interested pupils. Both subjects are optional and the choice depends on the wish of parents or pupils, subject to the proviso that a certain minimum number of pupils were interested in following any of the two subjects. The Court notes that it remains, in principle, within the national margin of appreciation left to the States under Article 2 of Protocol No. 1 to decide whether to provide religious instruction in public schools and, if so, what particular system of instruction should be adopted. The only limit which must not be exceeded in this area is the prohibition of indoctrination (see, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 53, Series A no. 23). The Court observes that the system of teaching religion and ethics as provided for by Polish law – in its model application – falls within the margin of appreciation as to the planning and setting of the curriculum accorded to States under Article 2 of Protocol No. 1.

105. Accordingly, the Court finds that the alleged failure to provide ethics classes does not disclose any appearance of a violation of the rights of the first and second applicants under Article 2 of Protocol No. 1. It follows

that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

106. The first two applicants further complained under Article 9 of the Convention that they had been requested to make a declaration as to whether their son would follow religious instruction and had thus been exposed to a risk of disclosure of their convictions. The Court observes that the first two applicants failed to substantiate this complaint. In any event, it notes that under the version of the Ordinance applicable to the facts of the present case the school authorities could not ask parents to make a "negative declaration" to the effect that their child would not follow religious instruction.

107. The applicants also alleged a breach of Article 13 of the Convention in that there had been no effective remedies available in their case. However, the Court notes that this complaint was formulated in very general terms and without having specified which substantive Article of the Convention it was related to.

108. Consequently, the Court finds that the above complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

109. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

110. The applicants claimed 150,000 euros (EUR) in respect of non-pecuniary damage for the suffering and distress occasioned by the violation.

111. The Government submitted that the claim was exorbitant. Alternatively, they invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

112. The Court considers that in the particular circumstances of the case the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which may have been sustained by the third applicant.

B. Costs and expenses

113. The applicants also claimed an unspecified sum for the cost of legal representation, to be awarded in accordance with the applicable rules.

114. The Government submitted that any award should be limited to those costs and expenses which were actually and necessarily incurred and were reasonable.

115. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the fact that the applicants failed to produce any documents showing that the sum claimed had been incurred, the Court rejects the claim for costs and expenses.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the third applicant's complaint under Article 14 taken in conjunction with Article 9 of the Convention about the absence of a mark on school reports admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 14 taken in conjunction with Article 9 of the Convention in respect of the third applicant;

3. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for non-pecuniary damage;

4. *Dismisses* unanimously the remainder of the claims for just satisfaction.

Done in English, and notified in writing on 15 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge David Thór Björgvinsson is annexed to this judgment.

N.B.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE DAVID THÓR BJÖRGVINSSON

1. I agree with the majority that the issues arising under Article 14 in conjunction with Article 9 or under Article 9 alone only concern the third applicant, Mateusz Grzelak, and that this complaint is incompatible *ratione personae* with regard to the first and second applicants. I can also agree that this complaint, as far as the third applicant is concerned, should be declared admissible. Furthermore, I agree that the alleged failure to provide classes in ethics does not disclose a violation of the rights of the first and second applicants under Article 2 of Protocol No. 1 and that this complaint is manifestly ill-founded and therefore inadmissible in accordance with Article 35 §§ 3 and 4.

2. However, I disagree with the majority's finding that there has been a violation of Article 14 taken in conjunction with Article 9 of the Convention.

3. The complaints made by the third applicant in relation to Articles 9 and 14 are in my view somewhat unclear. Taken as a whole, they seem to be threefold. Firstly, the third applicant alleges a breach of Article 9 of the Convention since his school reports did not include a mark for "religion/ethics" with the result that he is, in his submission, forced to reveal his religious convictions each time he has to present his school reports to someone. Secondly, in spite of the repeated requests made by his parents to the various primary and secondary schools attended by the third applicant he was unable to follow a class in ethics. Furthermore, the third applicant has been discriminated against on account of his and his parents' convictions.

4. As to the second complaint the majority does not deal with it as a separate complaint. In my view, although it would of course have been desirable to provide the third applicant with a course in ethics as an alternative to religious instruction, it must be accepted that this may not be feasible for practical purposes, i.e. when, as in this case, there are not enough interested pupils. The failure to provide classes in ethics as such does not reveal a breach of either Article 14 in conjunction with Article 9 or of Article 9 alone. It follows that I will, as the majority did, confine myself to issues relating to the giving of marks for "religion/ethics" or rather the absence thereof, which is a consequence of the fact that classes in ethics were not available.

5. When Article 14 is applied the first question that must be answered is whether there is a difference in treatment of persons in relevantly similar or analogous situations. In that regard I agree with the majority (see paragraph 90 of the judgment) that it is appropriate, as regards the complaint about the absence of a mark, to limit the alleged difference in treatment to a comparison between the third applicant, a non-believer who wished to follow classes in ethics and those pupils who followed religion classes.

6. Concerning the question of difference in treatment, it would seem from paragraph 88 of the judgment that the majority's finding that such difference existed is based on the mere fact that the applicant's school report did not feature a mark for "religion/ethics" since he did not attend the relevant class, while others were awarded a mark for their performance. An additional basis for finding difference in treatment would seem to be offered in paragraph 96 where it is mentioned that there is a difference in treatment because a mark for "religion/ethics" was factored into the calculation of a pupil's average mark, whereas a pupil like the third applicant not attending "religion/ethics" did not have this possibility.

7. It seems to me that these "differences" are not differences in treatment of persons in relevantly similar or analogous situations, within the meaning of Article 14 of the Convention. On the one hand, there are pupils who attended religious classes and received a mark for their performance. On the other hand, there is the applicant whose parents, in the exercise of their rights to freedom of conscience and religion i.e. under Article 9 of the Convention, decided that he should not attend classes on religion and received no mark in consequence since an alternative class in ethics was not available. For the purpose of giving marks for a particular subject, which is the relevant situation in this case, pupils who do not attend a particular class are not in the same situation as those who do attend. Also, as regards the calculation of the average mark after 1 September 2007 I fail to see a difference in treatment that would fall within the ambit of Article 14. In both groups only subjects that a pupil has completed are included in the calculation of his or her average mark. The possible positive or adverse impact of not having followed a course on religion or ethics, and not having received a mark as a result, could have on the applicant's average is a matter of pure speculation. Everything would hinge on his performance in the subject. The mere possibility that if he scored well enough his average might be increased cannot as such be a sufficient basis for finding a difference in treatment under Article 14. Accordingly, there is in my view, as regards marking or the calculation of an average mark, no difference in treatment of persons in relevantly similar or analogous situations. Having come to this conclusion there is no need to examine the facts of the case any further under Article 14 of the Convention.

8. However, although Article 14 is not in my view engaged, the question still remains whether there has been in this case a violation of Article 9 taken alone. In assessing this the following points should be kept in mind:

i. Firstly, the Court has dealt with a similar complaint in the case of *Saniewski v. Poland* ((dec.), no. 40319/98, 26 June 2001). In that case it was argued that the applicant's freedom of thought and conscience was breached since the absence of a mark for a course on "religion/ethics" revealed that he did not follow the course, and thus amounted to a public statement about his beliefs or non-beliefs, to the detriment of his future educational or employment prospects. The Court declared the complaint manifestly ill-founded (see also *C.J., J.J. and E.J. v. Poland*, no. 23380/94, Commission decision of 16 January 1996, DR 84, p. 46). As will be shown below, the reasons for the decision in the *Saniewski* case are also for most part relevant in the present case.

ii. The second point to be made is the fact that the applicant's parents are declared agnostics (see paragraph 6 of the judgment). In conformity with his parents' wishes the third applicant did not attend classes in religious instruction. The applicants claim that because of this decision the third applicant is a victim of various forms of inconvenience in the different schools he attended. However, it has not been substantiated that the school authorities can be held responsible for this. Furthermore, the third applicant's parents are declared agnostics in a society that is predominantly Catholic. The case file does not indicate that they had specific reservations about revealing their convictions. On the contrary, the parents have visibly pressed hard to have their rights as non-believers asserted. Although of course this is their right they cannot have it both ways. Furthermore, any degree of social stigmatisation that possibly flows from such a declaration for themselves and the third applicant is hardly more than they could reasonably have expected.

iii. In Poland there is no compulsory religious or ethical education in State schools. Both of these courses are only offered upon the request of the parents or of pupils who have reached the age of majority and provided there is a sufficient number of pupils interested. There are no indications in the case file that the third applicant has been subjected to any kind of indoctrination or pressure by the authorities as regards his religious or philosophical convictions. Nor has he been prevented from expressing his opinions on religion. (see *Saniewski v. Poland*, cited above).

iv. In *Saniewski v. Poland* (cited above) it was pointed out that the impugned school report had spaces reserved for marks for certain subjects and they were often left blank or treated with a straight line. This is due to the fact that special forms are used for school reports where certain subjects are listed which a pupil has not taken. The non-attendance of a particular class is reflected by the fact that the relevant space is left blank or a straight line is used. In *Saniewski* it was held that no definite conclusion could be

drawn from such a procedure as to whether the applicant was unwilling to attend the courses for which there was no mark in the report, or whether these courses simply were not organised in his school in the relevant school years. There are insufficient grounds for finding differently in the present case.

v. It has not been sufficiently substantiated by the third applicant that because of his school reports he will suffer prejudice as regards his future educational or employment prospects or that he has in any other way suffered prejudice. Consequently, the third applicant has not established that the impugned school reports have so far had or will in the future have any real material impact on his interests (see *Saniewski v. Poland*, cited above).

vi. Furthermore, it should be kept in mind that discrimination on religious grounds is prohibited under the domestic law of Poland. The applicant would, therefore, have a remedy to safeguard against any possible risk of future prejudice the school reports might conceivably engender whether in the context of further education or public or private employment (see *Saniewski v. Poland*, cited above).

vii. Finally, as pointed out by the majority in paragraph 98, the facts of the present case are different from those in *Saniewski v. Poland* in that the impugned school reports cover all of the third applicant's primary and secondary schooling, whereas in the *Saniewski* case only one report was at issue. This difference is only quantitative and does not in my view render the reasoning in the *Saniewski* case irrelevant in relation to the facts of the present case.

9. On the basis of the foregoing I respectfully submit that the third applicant has not substantiated the claim that, because of his school reports, he has in reality suffered, or will in the future suffer, detriment which would amount to an interference with his rights to freedom of thought, conscience and religion under Article 9 of the Convention, whether seen from its positive or negative aspect.